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AUTHOR Taylor, William L.
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ABSTRACT

This paper presents a broad overview of affirmative action in the United States, in regard to the provision of equality for Blacks, Hispanics, and women. Section I presents a brief history, while section II summarizes current policies that require or encourage the conscious use of race and sex as a remedial device in allocating jobs or educational opportunities. Several areas are discussed: (1) the prohibition of "unintentional" discrimination in employment, focusing on the Supreme Court's ruling in Griggs v. Duke Power Company and the ruling's impact on selection criteria and methods; (2) obligations of government-aided institutions, including government contractors and educational institutions, as well as the Federal government itself; (3) numerically based remedies provided by Federal courts; and (4) the legal encouragement of voluntary affirmative action (especially court rulings on reverse discrimination and the permissible scope of affirmative action by private institutions). Section III assesses the impact of affirmative action, citing data showing, despite small gains, that unemployment remains a great problem for Blacks, that women's salaries are barely more than half of what men earn, and other signs of inequity. Nonetheless, it is argued, the past two decades have produced more progress than any other historical period. Finally, section IV presents the views of proponents and opponents of affirmative action. (KH)

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AFFIRMATIVE ACTION IN THE UNITED STATES

by

William L. Taylor

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INTERNATIONAL PERSPECTIVES ON AFFIRMATIVE ACTION

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AFFIRMATIVE ACTION IN THE UNITED STATES

William L. Taylor

Our Constitution is color-blind and neither knows nor tolerates classes among citizens.

Justice John W. Harlan, dissenting in Plessy v. Ferguson, 163 U.S. 537, 559 (1896)

In order to get beyond racism we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently.

Justice Harry Blackmun, concurring in part in Bakke v. Regents of California, 438 U.S. 265, 307 (1978)

I. INTRODUCTION

For most of the history of the United States, race has been an important factor in the allocation of employment opportunities, educational services, and other public and private benefits.

Justice Harlan spoke in dissent at the end of the 19th century when the United States government was struggling with the issue of whether black people, having emerged from slavery, were entitled to the benefits of full citizenship. The majority of the Supreme Court in the Plessy case, deciding in the negative, placed the imprimatur of the Constitution on an official caste system imposed in the region of the nation where most black people lived. Under that system, blacks were segregated by law in public schools, barred from opportunities for higher education, and excluded or relegated to secondary jobs in government. State laws mirrored and often sanctioned prevailing mores that barred black people from training opportunities and skilled jobs in the private market and discriminated against them in wages and working conditions in the jobs they did hold.

Outside the South, the caste system was not as embedded in law,¹ but public policy both tolerated and fostered widespread discrimination

in public education, in colleges and professional schools, and in the job market, both public and private.

Other racial or ethnic groups that were identifiable by skin color were also subjected to parts of the official caste system. In the Southwest and West, for example, Hispanic Americans were segregated by law in public schools, Asian Americans were barred from many public and private jobs, and American Indians were subjected to widescale discrimination.²

For women, there is also a history of legal disabilities parallel in many ways to the second-class status imposed on minorities. Justice William Brennan summarized the history as follows:

Throughout much of the 19th century the position of women in our society was, in many respects comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children.³

In the latter part of the 19th and well into the 20th century, women were denied education and job opportunities through widely accepted convention and the imposition of state laws ostensibly designed for their protection. Thus, in upholding a state law limiting the hours that women could work in factories, the Supreme Court said that there was ample justification for the

. . . widespread belief that a woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting the conditions under which she should be permitted to work.⁴

Although barriers of discrimination were lowered to a degree, particularly outside the South, in the first half of the century, the official caste system sanctioned by Plessy held sway for more than a half-century. It was not until 1954 that the Supreme Court ruled that racial classifications imposed by government for the purpose of separating blacks from whites violated the equal protection guarantees of the United States Constitution.⁵ The Brown decision marked the beginning of the modern civil rights era. In the quarter-century since Brown, national policy has been adopted, often only after conflict and upheaval, to prohibit discrimination on the basis of race, national origin, religion, sex, or

other invidious distinctions in education, employment, and all other important institutions of American life. This policy--in the form of statutes, court decisions, and presidential orders--has been directed toward the elimination of discriminatory practices previously engaged in or sanctioned by government and toward the adoption of remedies that promise to eliminate the effects of past discrimination.

It is in this historical context that a current controversy has arisen over the use of race and sex-conscious policies in the allocation of employment and educational opportunities as a means for advancing the mobility of groups that have been victims of discrimination. The issue is the one posed by Justice Blackmun--whether "to get beyond racism we must first take account of race."

II. CURRENT AFFIRMATIVE ACTION POLICIES

Government policies requiring or encouraging the conscious use of race and sex as a remedial device in allocating jobs or educational opportunities generally are grouped together under the heading of "affirmative action."⁶ The principal affirmative action policies of the federal government that currently are in operation may be summarized as follows.

A. The Prohibition of "Unintentional" Discrimination in Employment

The major expression of national equal opportunity policy in the field of employment is in Title VII of the Civil Rights Act of 1964.⁷ In enacting Title VII, Congress for the first time established an obligation on the part of all but the smallest employers and unions to accord equal treatment to workers in hiring, training, promotions, and conditions of work. The law was based on a recognition of the need for strong corrective measures to redress the history of discrimination against minorities and women, as exemplified by the following provision:

. . . the court . . . may order such affirmative action as may be appropriate, which may include, but is not limited to reinstatement or hiring of employees, with or without backpay. Sect. 706(g).

Perhaps the single most important occurrence in the evolution of equal employment law was the determination by the agency administering

the law (the Equal Employment Opportunity Commission) and the United States Supreme Court that the mandate of Title VII could not be fulfilled simply by prohibiting practices intentionally designed to deny opportunities to minorities. The rationale for this determination was that in a society marred for years by pervasive discrimination, practices that are not racially motivated may nonetheless operate to disadvantage minority workers unfairly. Accordingly, in the landmark case of Griggs v. Duke Power Company,⁸ the Supreme Court applied Title VII to invalidate general intelligence tests and other criteria for employment that disproportionately excluded minorities if such tests are not shown to be dictated by business necessity. The tests used by the Duke Power Company were not found to be deliberately discriminatory, but the Supreme Court concluded that:

Good intent . . . does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability. 401 U.S. at 424.

Under Griggs, employers are not required necessarily to abandon "conventional selection criteria" for the allocation of job opportunities, but they are required to be conscious of the racial effects of applying such criteria. If the methods used disproportionately exclude minorities or women, the employer must seek alternative selection devices that do not have a discriminatory impact and that also serve the employer's interest in having an efficient and trustworthy work force.⁹ In other words, the employer's obligation is to identify selection criteria that will serve his need for a productive work force without disproportionately screening out minority or female applicants.¹⁰

While the Griggs doctrine invalidates employment practices that are not shown to be purposefully discriminatory, the basis for the principle does rest on the history of past discrimination. In Griggs itself, the Duke Power Company had previously intentionally excluded minority applicants from its work force. For the Court to have permitted past exclusionary practices to be replaced by a "neutral" device that adversely affected minorities would simply have resulted in the perpetuation of past discrimination. But the decision was also based on a

recognition that, apart from the employer's past practices or current intentions, the tests being used were inequitable because the disproportionate failure rate of minorities was traceable to discrimination by other institutions in American society. As the Supreme Court said in a later Decision:

Griggs was rightly concerned that the childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the rest of their lives.¹¹

In effect, the courts have rejected a narrow view that would focus exclusively on the question of fault, absolving employers and unions who are not badly motivated even at the cost of marring permanently the opportunities of people who have suffered discrimination. Instead, the law has been interpreted to permit practical intervention at points where it is possible to create opportunities that have been denied in the past.

The Griggs principle has been applied to require revision of other selection criteria and methods that have a discriminatory impact on minorities and women:

1. The reliance of employers and unions on word-of-mouth contact as a means for recruiting new employees. Such methods have an adverse impact on minority workers because they generally have less access to these informal networks, especially when the existing work force is largely white.¹² Employers have been required to substitute systems specifically designed to recruit minorities, e.g., visits to black colleges and universities, recruitment through minority organizations and media with a minority audience, use of minority employees to recruit others.¹³

2. The use of minimum height and weight standards as requisites for jobs in law enforcement and other fields. Such requirements screen out many women and also have an adverse impact on Hispanic Americans and other ethnic groups.¹⁴ The discarding or relaxation of these minimums (which often have been found invalid predictors of job performance) has facilitated the entry of women into police, fire-fighting, and correctional jobs from which they had long been excluded.

3. The use by employers of arrest records as an absolute bar to employment. Many members of minority groups grow up in environments where crime rates are high and people are often arrested on "suspicion." They are adversely affected by such requirements despite the fact that they would be honest and reliable employees.¹⁵

4. The practice of some unions and employers, particularly in the construction trades, of favoring relatives of current employees for new positions. Such policies, whether or not racially motivated, have been found to perpetuate the effects of past exclusion of minority workers.¹⁶

Some selection criteria, however, have received a degree of legal protection even though they have an adverse impact on minorities and women. The most prominent example is seniority systems, usually adopted by agreement between unions and employers, which base promotions and protection from layoffs on length of service. The Supreme Court, recognizing protections written into the 1964 statute for "bona fide" seniority systems (Section 703[h]), has held that such systems are not unlawful simply because they perpetuate the effects of discrimination that occurred before 1964.¹⁷ Such systems, however, must be modified to provide redress (in the form of retroactive seniority) to employees discriminated against after 1964.¹⁸

B. The Obligations of Government-Aided Institutions

Over the course of the past four decades, Congress and the president have determined in various policy pronouncements that there is a national interest in securing increased participation in employment, training, and educational opportunities by groups that have suffered exclusion from such opportunities in the past. To further this national interest, the federal government has called upon institutions which it assists or with which it does business to take affirmative steps to improve participation by minorities and women--often without a prior specific determination that the institution itself practiced discrimination. The measure most widely in use at the present time is a requirement that such

institutions establish numerical goals for increasing the representation of minorities and women and timetables for meeting the goals.

1. Government contractors: employment

Since the issuance of an executive order by President Franklin D. Roosevelt on the eve of World War II, the federal government has pursued a policy of prohibiting racial discrimination in the employment practices of businesses that hold contracts with the government. In the years after the war, the order had very little impact, although the country's growing defense industry brought increasing numbers of corporations and workers under its coverage.¹⁹

A significant strengthening of the policy came in 1961 when President Kennedy issued a new order establishing a duty on the part of federal contractors to undertake "affirmative action" to ensure equal employment opportunity in all company facilities.²⁰

The Kennedy order was the first modern articulation on a national level of the concept of affirmative action.²¹ It was based on the view that a simple termination of overtly discriminatory practices might bring little actual change. The order also reflected a belief that, if employers would cooperate, the time and resources of the contract compliance program would be well spent in developing new channels of opportunity for minorities rather than solely in assessing culpability for past discrimination. Accordingly, federal officials emphasized specific affirmative steps--e.g., visits to black colleges, contacts with minority organizations and media--that employers would take to increase minority participation in their work forces.

As the program has evolved, the Department of Labor requires contractors to undertake an evaluation of their patterns of employment of minorities and women in all job categories. The employer is then required to identify obstacles to the full utilization of minorities and women that may account for their low participation and to develop an affirmative action plan to overcome the obstacles identified.²² The affirmative action plan may include measures for improved recruiting, new training programs, revisions in criteria for hiring and promotion, and other steps.

While gains were made in the 1960s, many companies went through the litany of affirmative action steps in a perfunctory way without securing significant changes in the employment of minorities and women workers. Out of the experience grew the concept of "goals and timetables" for the employment of minorities and women, applied first in the construction trades and later to all contractors.

Employers are asked to compare their utilization of minorities and women in the available and relevant labor pool, a determination that may vary with the industry and the location of the contractor's facility. Where the analysis reveals underutilization, the contractor is required to develop goals and timetables for fuller participation.²³

The goals set, generally expressed in a range (e.g., 12 to 16 percent), reflect assessments of the available numbers of minorities and women who possess the needed skills and of the ways those numbers could be increased through training programs. The goals are objectives, not fixed requirements, since no penalties are imposed for failure to reach them as long as a contractor can demonstrate that he has made good-faith efforts to comply. Nor are employers compelled to hire unqualified persons or to compromise valid hiring standards to meet the established goal.

The courts have upheld the validity of the contract compliance program, including its provisions for goals and timetables, in part as an exercise of the federal government's authority to enlarge the manpower pool available to meet national needs. Claims that the program involves an impermissible use of race and conflicts with congressional policy against requiring an employer to grant preferential treatment simply because of imbalances in the work force have been rejected.²⁴

2. Government contractors: minority business enterprise

The federal government also has used its contracting and grant-making authority to encourage the development of minority-owned business enterprises, by seeking to assure that such enterprises receive a share of the work on government projects.

A recent expression of this national policy was a provision included by Congress in the Public Works Employment Act of 1977 requiring state

and local governments, absent a waiver by the Department of Commerce, to use 10 percent of federal funds granted from public works to procure services from businesses owned or controlled by members of minority groups. The groups specified were "Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts" and the "set-aside" for members of these groups was based on general congressional findings that their limited participation in public contracting opportunities reflected the current consequences of past discrimination and disadvantage.²⁵

In 1980, in a 6 to 3 decision, the Supreme Court upheld the constitutionality of this set-aside provision as an appropriate exercise of congressional spending power. The Court rejected claims of the contractor that the act gave "select minority groups" a preferred standing in the construction industry, saying that the program was remedial in character and was designed to place the groups "on a more equitable footing with respect to public contracting opportunities."²⁶

3. Federal employment

The federal government places its own personnel managers under obligations similar to those imposed on government contractors to assure increased participation by minorities and women in the federal work force. Under Title VII of the 1964 Act, the Civil Service Commission (now replaced by the Equal Employment Opportunity Commission) is responsible for reviewing plans obtained from each department and agency "to maintain an affirmative action program of equal employment opportunity."²⁷

The courts also have applied the Griggs doctrine to require the modification of aptitude tests for federal employment which adversely affected the job prospects of minorities and which were not shown to be job-related.²⁸

4. Government-aided educational institutions: affirmative admissions policies

Under various laws, the federal government provides substantial assistance in the form of grants, guaranteed loans, and other subsidies to public and private colleges and universities throughout the nation. As a

condition of obtaining such assistance, Congress has required that recipient institutions refrain from discrimination on the basis of race, national origin, sex, or handicapped status in the admission of students.²⁹

The regulations promulgated under these civil rights laws by the Department of Education require that institutions that have engaged in discrimination take "affirmative action to overcome the effects of prior discrimination."³⁰ Unlike the requirements of the contract compliance program, however, institutions of higher education have not been ordered to take concrete steps except upon a determination that they themselves practiced discrimination.

Very few such determinations have been made, and most of the controversy over race-conscious admissions policies of colleges, universities, and professional schools centers around affirmative admissions policies that some of these institutions have adopted voluntarily to comply with the spirit of national policy. See Section II D, infra.

C. Numerically Based Remedies in the Courts

As indicated in Section II D, much attention of the federal courts has been focused on examining the impact of seemingly neutral selection criteria on minorities and women and determining whether such standards are job-related. Like federal agencies, however, courts have found that where practices that have led to the exclusion of minorities and women are long-entrenched, a simple abandonment of them may not produce significant change.

Thus, in their search for efficacious remedies, courts, having determined the existence of discrimination, have often found it advisable to issue orders that provide yardsticks for measuring change. Typically, a court may require that a specified percentage of all new hires be members of the group discriminated against until a specific goal of minority participation in the work force is reached. As with goals and timetables, the ultimate objective is set with reference to the proportion of minority workers in the available and relevant labor pool.

In Carter v. Gallagher,³¹ for example, a federal court found that the Minneapolis Fire Department had illegally discriminated against minorities. The court ordered that one of every three new employees hired by the department be a qualified minority person until at least 20 minority workers were employed. In other cases, e.g., where unvalidated tests have operated as an exclusionary device, courts also have ordered the establishment of separate eligibility lists for white male and minority women candidates and their selection from the top of each list in a proportion established by the court.³²

Although these kinds of orders are more stringent than goals and timetables in that they prevent employers from filling vacancies until proportionate numbers of minority and women candidates are found, the courts do not view such orders as imposing strict quotas. The orders do not require employers to hire any candidate who is properly determined to be unqualified for the position. Nor are the remedies permanent in character; courts have stressed that once the goal of minority participation is achieved, past discrimination will be deemed to have been remedied and the employer or union will no longer be subject to fixed hiring requirements.³³

Further, courts have tempered their orders by considering the interests of nonminority workers in protecting the status they have attained. So, for example, one court of appeals, while sustaining a numerical requirement for new hiring, barred a similar requirement for promotions on grounds that it would interfere with the "established career expectancies of current employees."³⁴ Similarly, while courts will award retroactive seniority to persons who have been discriminated against to "make them whole" for their injuries, the orders generally will not displace nonminority workers from positions they already hold.³⁵ And while the law is not completely settled, it appears that the results of affirmative actions, including those embodying numerical requirements, may be undone when an employer finds it necessary to reduce his work force and follows an established seniority system in deciding which employees to lay off.³⁶

Despite these limitations and qualifications, numerically based remedies have been widely employed to gain entry for minorities and women to fields from which they were traditionally excluded. In the private sector, the remedies have been applied to major utilities such as telephone and power companies, to skilled occupations in the building trades, and to remunerative blue-collar jobs in the trucking industry. In the public sector, many of the cases have been directed against police, fire, and correctional departments, which until recently employed few, if any, minorities and women. The use of numerically based remedies has been approved by federal courts of appeals in every region of the nation.³⁷ The Supreme Court has not spoken definitively on the issue but has refused to disturb lower court decisions requiring numerically based remedies.

D. Legal Encouragement of Voluntary Affirmative Action

As federal equal opportunity law and affirmative action policy have evolved over the past 15 years, some institutions in American society--universities, employers, unions--have decided voluntarily to revise their selection criteria to secure greater participation by minorities and women. Voluntary action has been prompted in part by a tacit recognition by the institutions that their past policies were exclusionary, leaving them vulnerable to legal sanctions, and in part by a growing belief that inclusionary policies serve the larger interests of the institutions (e.g., the interest of universities in diversity, the interest of employers in increasing the pool of qualified employees).

Voluntary race-conscious policies have given rise to legal challenges by white male students and employees aggrieved by decisions to give greater opportunity to minorities and women to compete for positions that ordinarily are limited in number. The legal challenges have resulted in important Supreme Court decisions that define broadly the permissible scope of race-conscious action under the American constitutional legal system.

Where voluntary affirmative action programs are initiated by public bodies such as state universities or governmental employers, the basic

issue is whether race-conscious measures designed for remedial or other beneficent purposes violate the Fourteenth Amendment, which prohibits states from denying the equal protection of the laws. In interpreting the equal protection clause, courts ordinarily regard classifications of people by race as highly suspect.

Where affirmative action programs are voluntarily undertaken by private institutions such as employers and unions, the issue ordinarily is not a constitutional one but rather whether such race-conscious programs violate federal statutes prohibiting discrimination.

The Supreme Court addressed the first issue--the constitutional obligations of public bodies--in Regents of the University of California v. Bakke.³⁸ A new medical school of the University of California was confronted, as were other state-operated professional schools, with extraordinarily low rates of minority admissions. The school's first class enrolled three Asians, but no blacks, Mexican Americans, or American Indians. To overcome this virtual exclusion of minorities, the medical school in 1970 initiated a special admissions program that, in effect, reserved 16 of 100 available openings for qualified minorities. A separate admissions committee reviewed applications for admission to these openings. Alan Bakke, a white male applicant, challenged his exclusion from consideration for any of the 16 places and the admission of minority applicants with lower academic credentials, as measured by standardized tests.³⁹

While the Supreme Court ruled in favor of Alan Bakke, the most important aspect of the decision was the expressed view of a majority of the justices that under appropriate circumstances race-conscious actions by public bodies to secure increased participation by minorities are consistent with the U.S. Constitution. The justices differed on the strength of the rationale needed to validate a voluntary affirmative action program. Several members of the Court believed that a history of societal discrimination that prevented members of minority groups from acquiring academic credentials justified a policy of departing from conventional criteria of basing admissions strictly on test performance

and grade averages.⁴⁰ In contrast, Justice Powell found the concept of societal discrimination amorphous and suggested that remedial programs are more properly based on findings by competent public bodies that government has in the past engaged in unlawful discrimination.⁴¹

Justice Powell, however, believed that there were other rationales that could sustain race-conscious admissions programs, principally the educational value of having an ethnically diverse body.⁴²

For Justice Powell and four other justices, the nub of the problem was the way in which the medical school administered its program. For Powell, the two-track, separately administered system that reserved a specific number of seats for minorities made race the sole factor in creating a diverse student body, in violation of the Fourteenth Amendment. For four other members of the Court, the two-track system meant that whites were being totally excluded from a program subsidized by federal funds in violation of Title VI of the 1964 Civil Rights Act, a statute enacted under the authority of the Fourteenth Amendment to prevent discrimination in federally assisted programs.⁴³

The impact of the Bakke decision was to eliminate a handful of programs in which separate admissions systems had been established for minorities. The opinions gave encouragement to the continuation of voluntary programs supported by an articulated desire to redress discrimination or to promote diversity and administered on a unified, flexible basis.

The second issue--the permissible scope for affirmative action by private institutions--was addressed in United Steelworkers of America v. Weber.⁴⁴ In 1974, the Kaiser Aluminum and Chemical Corporation and the United Steelworkers Union negotiated an agreement designed to increase black participation in Kaiser's craft jobs from 2 percent to the level of black participation in the area's work force, which was approximately 39 percent. To accomplish this goal, the plan created a new on-the-job training program that reserved 50 percent of the openings for black employees. This allocation resulted in the selection of some black employees over white employees who had accumulated more

seniority at the plant. Brian Weber, one such white employee, challenged the plan.

By a 5 to 2 margin, the Supreme Court ruled that the "racial preferences" in the Kaiser plan were a lawful means for eliminating "old patterns of racial segregation and hierarchy."⁴⁵ While no record had been made of past illegal action by Kaiser or the Steelworkers Union, the Court believed the plan was appropriately undergirded by a history of societal discrimination, citing studies and judicial findings of the general exclusion of minorities from skilled craft jobs by unions and employers.⁴⁶

While conceding that Title VII, like most civil rights laws, generally forbade the use of race in the selection process, the Court noted that the primary purpose of the law was "to open employment opportunities for Negroes in occupations which have been traditionally closed to them."⁴⁷

Having decided that voluntary affirmative action was consistent with Title VII, the Court found that the specific Kaiser plan was lawful in that it was carefully drawn and did not "unnecessarily trammel the interests of white employees."⁴⁸ In reaching this conclusion, the opinion specifically noted that the plan did not require the discharge of white workers, did not ban their advancement (since half of those receiving training would be white), and was designed as a temporary measure to end when the percentage of black skilled craft workers approximated the percentage of blacks in the local labor force.⁴⁹

In sum, the Bakke and Weber decisions gave broad sanction to voluntary use of race or sex as a factor in the selection process for remedial purposes or to serve other societal interests. The general approval of such measures is qualified by a need to assure protection for the legitimate interests of white workers and students by providing for procedural fairness and tailoring the character and duration of the plan to the societal need to be served.

While the current administration has announced its opposition to affirmative action and its disagreement with the Weber decision,⁵⁰ the formal regulations and policies of the federal government still encourage and protect such voluntary initiatives.⁵¹

III. THE IMPACT OF AFFIRMATIVE ACTION

Proponents of affirmative action do not regard it as a self-sufficient strategy for eliminating the effects of discrimination and deprivation, and providing mobility for minorities and women, but as one among several policies (others include education, training, job creation, economic development) needed to achieve that objective. Accordingly, movement or inertia in the status of minorities and women during the period in which affirmative action has been pursued may not permit conclusive judgments about its effectiveness, but rather reflect success or failure in implementing other complementary policies. Moreover, considering the amount of controversy over the policy, relatively little study has been devoted to isolating affirmative action programs as a factor in producing change. Still, it is fair to use whatever tools may be at hand to assess what is known about the effects of a major national policy that has been in operation for more than a decade.

Gauged by the broadest indicators used to determine the relative status of groups in American society, very large numbers of people have not been reached by affirmative action policies. For example, over a period of more than three decades, the unemployment rate for black people has remained discouragingly constant at about twice the rate for whites.⁵² In fact, from 1960 to 1977, the participation of black men in the labor force actually dropped from 83 percent to 71 percent.

Similarly, despite small gains, the median income of black families has remained about three-fifths of that of white families for more than two decades. And despite the entry of large numbers of women into the labor force in recent years, their median income is little more than half of the median income of men.

The seeming intractability of the unemployment gap has also meant the persistence of poverty as a problem for minority people. In 1981, more than one of every three black people (34.2 percent) was among the ranks of the poor. While this reflects some progress over a 15-year period (in 1966 two of every five blacks was poor), and a narrowing of the gap

between whites and blacks (the rate for whites was 11.3 percent in 1966 and 11.1 percent in 1981),⁵³ it is clear that very large numbers of black people have not been affected by affirmative action or other anti-poverty programs undertaken during the 1960s.

These gross indicators of economic status and income, however, tend to mask important changes that have been occurring in the occupational distribution and educational attainment of minorities. From 1961 to 1982, for example, the proportion of black workers in the labor force employed in professional jobs increased from 4.6 percent to 13 percent. The proportion of black workers in managerial jobs moved from 2.5 percent to 5.5 percent in the same period. While these gains reflect in part a general restructuring of occupational distribution for American workers, their significance can be gleaned from the fact that gains for whites in the same period were more modest (12.3 percent to 17.3 percent in the professions and 11.6 percent to 12.2 percent).⁵⁴

Encouraging indications of mobility emerge when attention is directed to younger minority groups in the population. In 1968, 12.4 percent of all black women in the 25-34 age category were employed in professional jobs. By 1977, the proportion for the same groups (then in the 35-44 age category) had increased to 18.8 percent.⁵⁵ For younger and more educated blacks, the income gap closed far more significantly than for the general population. In 1976, blacks in the age group 25-29 who were college graduates earned 93 percent as much as their white counterparts, a gain of about 12 percent in 12 years.⁵⁶ William Wilson, a political scientist who minimizes the continuing impact of discrimination as an explanation for current racial disparities, nonetheless credits fair employment programs and corporate recruitment at black colleges as factors contributing to these gains.⁵⁷

The improved occupational status and growing income of minorities reflect important changes in educational attainment. As recently as 1966, the number of black students attending college was only 340,000. By 1974, black enrollment had risen to 814,000, and in 1982 it was more than 1 million.⁵⁸ While part of the increase may be accounted for

by the growth of black community colleges, by 1980, 80 percent of black students attended predominantly white institutions. Changes in expectations and prospects for minorities are suggested by the rise in the proportion of black students majoring in business from 5 percent in 1966 to 18 percent, while concentration in occupations traditionally reserved for blacks declined.⁵⁹

Significant change also has taken place in the enrollment of minorities in professional schools--particularly in medical and law schools, which have been targets of affirmative action efforts. Law schools as recently as 1969 had a black enrollment of 3 percent. By 1979, black enrollment had risen to 4.2 percent and total minority enrollment, including Hispanic Americans, Asian Americans, and American Indians, as well as blacks, was at 8.1 percent.⁶⁰

Medical schools, many of which excluded black students until after World War II, had only a 2.7 percent black enrollment in 1968. By 1980, black enrollment had risen to 5.7 percent and minorities were 7.9 percent of the total medical school population.⁶¹

The magnitude of the change is illustrated by the fact that 3,000 black students were enrolled in medical schools in 1974 at a time when there were only 6,000 black physicians in the nation. Studies showing that significant numbers of minority students come from families of lower income and job status indicate that rising enrollments reflect increased mobility, not simply changing occupational preferences among middle class families.⁶²

Evidence that equal opportunity policies have been an important factor in this overall progress can be gleaned from changes in areas and industries that have been the subject of affirmative action initiatives. Bernard Anderson has reported substantial gains in the employment of black workers in managerial and skilled craft positions in the huge Bell Telephone system after the company entered into consent decree in 1973 calling for the initiation of goals and timetables.⁶³ Similar progress has been reported in the employment of minorities and women in skilled positions in the steel industry following a consent decree in 1974.⁶⁴

Affirmative action initiatives have also helped women gain entry into "nontraditional" occupations ranging from coal mining (where their proportion has gone from 0 in 1973 to 8.7 percent in 1980)⁶⁵ to banking (where in Cleveland the percentage of women working as officials and managers rose 20 percent in three years after an affirmative action campaign).⁶⁶

In Philadelphia, where the concept of goals and timetables was first applied, minorities constituted only 1 percent of skilled construction workers in 1969 and 12 percent in 1981.⁶⁷ In law enforcement, which has been a special target of litigation and other affirmative action efforts, the numbers of black police officers have risen from 24,000 in 1970 to 43,500 in 1980.⁶⁸

Some of the gains summarized here may be fragile. The managerial positions secured by minority workers are located disproportionately in the public sector--in federal, state, and local government--an area which, after many years of expansion, is now shrinking. In private industry, minorities are still concentrated in the lower skill ranges of each occupational category and many of the positions they hold are regarded as peripheral to the main work of the company. In times of economic recession, the application of seniority principles can have a devastating effect on minority workers.

Yet, with all of these caveats, national equal opportunity policies of the past two decades, including affirmative action, have produced more tangible progress than at any other time in American history.

IV. THE DEBATE OVER AFFIRMATIVE ACTION

From the foregoing discussion, it can be seen that the principal, if not exclusive, rationale articulated for affirmative action policies is that they serve a remedial purpose, i.e., that such programs are necessary to provide equal opportunity for persons victimized by discrimination to compete effectively for educational services and in the job market.

The remedial aim of such policies is to be distinguished from the concepts of "reparations" and "redistribution."

A program designed to accomplish reparations would include as beneficiaries all members of the group thought to be victimized. A program of redistribution would have as its sole criterion membership in the group defined to be economically or otherwise deprived. In contrast, affirmative action is not viewed as an end in itself but as a means to equalize opportunity in the competition for the resources that would be made available directly under a program of reparations or redistribution. Under affirmative action programs, membership in a group is not sufficient to avail oneself of benefits; other threshold criteria of merit must be met to qualify for job vacancies or positions in a professional school.

Further, while affirmative action policies may serve indirectly other objectives such as power sharing, domestic tranquility, the correction of flawed selection criteria, to the extent they are achieved, they are by-products. Absent the remedial goal, none would provide a sufficient basis under the American legal system for government to mandate the race-conscious policies of affirmative action.

The principal critics of affirmative action have been academicians, politicians, and spokespersons for Jewish and other ethnic groups that have been subjected to private practices of discrimination but that are not ordinarily among the groups defined as protected under race-conscious programs.⁶⁹ Employers are notably absent from the leadership of the anti-affirmative-action movement; those who have complained usually confine their protests to the paperwork and bureaucratic requirements of the program.⁷⁰

The common thread of criticism is that racial distinctions of any kind and for any purpose are anathema in the American legal system, that in the words of one opponent they "would reintroduce the hated element of racism into the social fabric."⁷¹ The dangers perceived in policies based on race are several.

Prime among them is the erosion of the merit system as the prime method for allocating benefits and status in American society. While some critics acknowledge that affirmative action policies incorporate merit requirements, they argue from anecdotal evidence that in practice

unqualified persons have been selected and that ultimately merit requirements will be subverted entirely.

In national terms, they say, the erosion of merit standards will mean a loss in the productive capacity of the nation. In personal terms, the argument is that the preference given to minorities and women is unfair to white males who will lose opportunities to persons less qualified than they. Affirmative action policies are overinclusive, critics claim, because they give an edge to some such as Asian Americans, who as a group are more advantaged (in terms of group income and educational attainment) than others who are left out. The policies are under-inclusive because they ignore groups such as Jews and Italian Americans, which have suffered private discrimination. These groups are overrepresented in some occupations (such as teaching and construction work) because they have been excluded from others and the push for minority representation in the occupations where ethnic groups are concentrated is viewed as double discrimination.

Opponents are not reassured by the description of affirmative action as a temporary expedient because, they predict, if allowed to continue, it will expand to include other groups and ultimately achieve enough support to be made permanent.

Further, critics such as Thomas Sowell view affirmative action as against the long-range self-interest of minorities. Affirmative action, he argues, stigmatizes all members of minority groups in the public eye in that the qualifications of minorities who have achieved high occupational status are regarded as suspect.

Little consensus exists among opponents of affirmative action on what, if any, policy should be substituted. Some would accept elements of the program, e.g., outreach in recruitment to minority colleges and media, remedial education and training that do not involve the use of numerical goals. But almost all proceed from an assumption that in the words of George Gilder, "discrimination has already been effectively abolished in this country"⁷² or that it is rapidly being eliminated. Given this assumption, affirmative action policies either provide no help (to poor

people whose problems are assumed to stem from causes other than discrimination; or unwarranted help (to "those who are already on the upward-mobile escalator").⁷³

Civil rights remedies in this view should be available only to individuals, not groups. In order to qualify for relief, claimants would have to establish that they were subjected to discrimination by the institution against which they are making the claim and that the remedy gives them no more than they would have had absent discrimination.

It is this latter set of assumptions and views that is challenged most sharply by proponents of affirmative action policy. They respond that discrimination still is practiced and that to ignore the continuing consequences of past discrimination is to assume that "history is something that ended yesterday (through passage of a few anti-discrimination laws) and that it has no palpable consequences in the present or future."⁷⁴ To argue that racial wrongs against a group can be redressed by individual "race neutral" remedies in which the presumption is against continuing consequences is to insure the perpetuation of discrimination.⁷⁵

Proponents of affirmative action also dispute the other major points of the critics. Far from hindering national productivity, affirmative action is designed to enhance it by providing opportunities for several million people whose potential has been stunted by discrimination.

While recognizing the importance and difficulty of achieving fairness to all, proponents say that courts and government agencies have conscientiously taken account of the interests of white workers and students. Applying seniority principles, for example, the courts have made it plain that white people will not be displaced from positions they hold to remedy a racial wrong, no matter how grievous. In these cases, a minority person who has earned the right to a job that someone else is occupying may not obtain a complete remedy. In others, whites may suffer a loss in disappointed expectations.

Proponents note also the absence of any significant number of documented complaints that merit standards have been violated or challenges by

employers to enforcement actions they regard as unfair. Assuming the validity of charges of occasional abuse, they say there is no reason to believe that correcting the abuses requires abandoning affirmative action policy.

As to claims that race-conscious policies will stigmatize minorities, it is important to note that the policies are not ordinarily applied directly to alter ultimate results--to change immediately the number of minority lawyers, master electricians, or corporate executives or to alter income disparities. Rather, affirmative action is being applied at the gateways, in opportunities for professional training and in entry-level positions in business and industry. What is offered is an opportunity to compete, to acquire the necessary training to become a lawyer, master electrician, or business executive. Persons who are able to come through the competition successfully need have no fear of being stigmatized by affirmative action but only by the continuation of long-standing prejudice.

Finally, proponents say that the suggestion of critics that affirmative action as a temporary remedial device will become a permanent system of quotas seriously misconstrues power relationships in the United States. They note that Reconstruction, the major effort of the last century to redress racial wrongs, was terminated by government before effective remedies were provided. Although the economic and political position of black people and other beneficiaries of affirmative action has improved in this century, they remain relatively powerless.⁷⁶ Affirmative action policies were adopted and continue because the governing majority perceived the existence of a wrong that required firm corrective measures. It is virtually impossible, proponents say, that affirmative action measures would survive a changed perception that the wrong had been corrected. Indeed, they say that the danger is far greater that such measures will be abandoned before they have a chance to work than that minorities will gain power to institutionalize these measures permanently.

In sum, the dilemma of affirmative action is implicit in Lyndon Johnson's metaphorical exposition of the need for such a policy. He said:

You do not take a person who for years has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say "You are free to compete with all the others" and still believe that you have been completely fair.

The issue is one of comparative dangers. Critics of affirmative action argue largely from theory that affirmative action runs the risk of advancing minorities to a point in the race that they would not have reached through their own efforts and talents. Proponents respond that there is almost no evidence that affirmative action has had this impact thus far. And they argue from history and experience that the danger is much greater that the policy will be abandoned while the person who has been hobbled by chains is still far behind in the race.

NOTES

1. T. Emerson, D. Haber, and N. Dorsen, Political and Civil Rights in the United States (3rd edition, 1967), pp. 1731-35.
2. Id.
3. Frontiero v. Richardson, 411 U.S. 677, 685 (1973).
4. Muller v. Oregon, 208 U.S. 412, 420 (1908). In an earlier decision, one justice stated his views more baldly, saying that "[m]an is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." Bradwell v. State, 83 U.S. 130, 141 (1873) (Bradley, J. concurring).
5. Brown v. Board of Education, 347 U.S. 483 (1954).
6. Reasoned debate is often hindered by the semantic labels attached to such policies. Opponents often talk of "reverse discrimination" or "preferential treatment" policies. Proponents prefer the terms "race conscious" or "affirmative action" policies. Where labels cannot be avoided easily, "affirmative action"--the term most often employed in the statutes--will be used in this paper.
7. 42 U.S.C. §§2000e-2000e-17 (1976).
8. 401 U.S. 424 (1971).
9. Albermarle Paper Company v. Moody, 422 U.S. 405 (1975).
10. A by-product of Griggs has been the discovery through research that many conventional selection criteria previously presumed to be job-related do not actually measure an applicant's ability to perform a given job. General aptitude tests, for example, may not predict whether an applicant will perform well as a steamfitter or fork-lift operator. Rather, such tests have served as a means for winnowing down large pools of qualified applicants without requiring careful scrutiny by the employer.
11. McDonnell Douglas v. Green, 411 U.S. 792, 806 (1973).
12. See, e.g., Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir., 1970).
13. United States v. Georgia Power Co., 474 F.2d 906, 925-926 (5th Cir., 1973).

14. Dothard v. Rawlinson, 433 U.S. 321 (1977); Smith v. City of East Cleveland, 520 F.2d 492 (6th Cir., 1975).
15. See, Gregory v. Litton Systems, 316 F.Supp. 401 (C.D. Calif., 1970), aff'd, 472 F.2d 631 (9th Cir., 1972). Cf. New York City Transit Authority v. Beazer, 440 U.S. 568 (1979), rejecting a challenge to an employment rule that barred people undergoing treatment for drug use as transit workers.
16. See Asbestos Workers Local 53 v. Vogler, 407 F.2d 1047 (5th Cir., 1969); U.S. Commission on Civil Rights, The Challenge Ahead: Equal Opportunity in Referral Unions (1977), pp. 84-89.
17. International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).
18. Id.; Franks v. Bowman Transportation Co., Inc., 424 U.S. 747 (1976). People entitled to relief include not only employees whose applications were denied, but others who were deterred from applying because of a known policy of discrimination.
19. It is estimated that more than 30 million employees currently are covered by the executive order.
20. In its current form, the provision is found in E.O. 11246, II, Sec. 203, 30 Fed.Reg. 12319. In 1967, the order was amended to extend coverage to women. E.O. 11375, 32 Fed.Reg. 14303.
- More recently, other groups have been designated as beneficiaries of affirmative action programs. Under Section 503 of the Rehabilitation Act of 1973, government contractors are required to take affirmative action to employ qualified persons who are handicapped. Under Section 402 of the Vietnam Veterans Readjustment Assistance Act of 1974, contractors' affirmative action obligations are extended to disabled veterans and other veterans of the Vietnam era.
21. It was not, however, the first time that the United States government had taken race-conscious actions to rectify a wrong against a particular group. In the years after the Civil War, Congress adopted a variety of programs making available to black people educational assistance, social welfare benefits, and land grants. Many of these programs were not limited to newly freed slaves and were administered by the Freedmen's Bureau until the end of Reconstruction. See G. Bentley, A History of the Freedmen's Bureau.
22. 41 Code of Federal Regulations (CFR) 60-1:40.
23. 41 C.F.R. Part 60-2 (1974). This provision, known as Revised Order No. 4, applies to nonconstruction contractors. A parallel set of requirements (41 C.F.R. Part 60-4) applies to construction contractors.

24. See, e.g., Associated General Contractors v. Altschuler, 490 F.2d 9, 16-17 (1st Cir., 1973), cert. denied, 416 U.S. 957 (1974); United States v. Mississippi Power and Light Co., 638 F.2d 899 (5th Cir., 1981), cert. denied, 50 USLW 3271 (October 1981). The congressional policy against preferential treatment is contained in Section 703(g) of Title VII.

25. The provision is found in 42 U.S.C. §6705(f)(2)(1976 and Supp. III., 1979). Other assistance to minority enterprise is provided under the Small Business Act. Beginning in 1968, the president directed the Small Business Administration to develop a program to aid small business concerns owned and controlled by "socially and economically disadvantaged" persons to achieve a competitive position in the economy. Pub.L. 85-536 §2(8), 72 Stat. 389; as amended by, Pub.L. 95-507, 92 Stat. 1757; 13 C.F.R. Part 124.

26. Fullilove v. Klutznick, 448 U.S. 448, pp. 485-86.

27. The requirement is contained in Section 717(b)(1) of the Act. 42 U.S.C. §2000e et seq.

28. Douglas v. Hampton, 512 F.2d 976 (D.C. Cir., 1975).

29. The prohibition against race discrimination in the use of federal funds is contained in Title VI of the Civil Rights Act of 1964. The prohibition against sex discrimination is part of the Educational Amendments of 1972. The ban against discrimination against disabled people is contained in Section 504 of the Vocational Rehabilitation Act of 1973.

30. 45 C.F.R. Part 80.

31. 452 F.2d 315 (8th Cir.), modified en banc, 452 F.2d 327 (8th Cir., 1971), cert. denied, 406 U.S. 950 (1972).

32. See, e.g., United States v. City of Chicago, 549 F.2d 415-436-37 (7th Cir.), cert. denied, 434 U.S. 875 (1977), remedial order reconsidered and aff'd, 531 F.2d 469 (7th Cir., 1980); Bridgeport Guardians v. Bridgeport Civil Service Commission, 482 F.2d 1333 (2d Cir., 1973); cert. denied, 421 U.S. 991 (1975).

33. See Rios v. Steamfitters Local 638, 501 F.2d 622 (2d Cir., 1974). The Supreme Court has suggested that absent discrimination, it is to be expected that work forces will be "more or less representative of the population in the community from which employees are hired." International Brotherhood of Teamsters v. United States, 431 U.S. 324, pp. 339-40, n. 20 (1977).

34. Kirkland v. New York State Department of Correctional Services, 520 F.2d 420 (2d Cir.), rehearing en banc denied, 531 F.2d 5 (2d Cir., 1975). Cf. EEOC v. American Telephone & Telegraph Co., 556 F.2d 167 (3d Cir., 1977), cert. denied, 438 U.S. 915 (1978).

35. Instead, courts may award monetary compensation to minority workers who must await vacancies in positions they would have held had they not been discriminated against. In contrast, where the "expectations" rather than the "vested status" of nonminority workers is at stake, the courts often reach a different result. In one case, a male employee who was passed over for promotion in favor of a less senior female employee pursuant to an affirmative action plan was held to be entitled to monetary compensation but not the promotion. McAleer v. AT & T, 416 F.Supp. 435 (D. D.C. 1976).

36. See Watkins v. United Steelworkers Local 2369, 516 F.2d 41 (5th Cir., 1975). The question of how to prevent economic recession from wiping out the beneficial effects of affirmative action remedies has received much discussion. Among the legal remedies that have been suggested are money damages to nonminority employees for the loss of accrued seniority or orders to employers to retain incumbent employees who otherwise would have been laid off. The latter would place the burden on the culpable party--the employer--rather than choosing between the minority victim of discrimination and the nonminority employee who may have benefited from it. Other public policy initiatives, such as work-sharing through reduction of hours or rotation of layoffs, have been proposed to preserve opportunities created through affirmative action, while according fair treatment to senior white workers. See, e.g., U.S. Commission on Civil Rights, Last Hired, First Fired: Layoffs and Civil Rights (1977). In one recent decision, a federal appeals court upheld the right of a company and union to agree voluntarily to modify a seniority system to assume that some recently hired minority and women workers retained their positions during layoffs. Tangren v. Wackenhut Services, Inc., 638 F.2d 705 (9th Cir., 1981).

37. The cases are collected in U.S. Commission on Civil Rights, Affirmative Action in the 1980s: Dismantling the Process of Discrimination (1981), at fn. 60, p. 22.

38. 438 U.S. 265 (1978).

39. No party in the case questioned the validity of the tests that, along with undergraduate grades, are used to predict performance in medical school.

40. The Court was aware, of course, that universities frequently depart from these criteria to admit the sons and daughters of wealthy alumni, to achieve geographical diversity, and for other reasons.

41. 438 U.S. at 307-310. This explicit predicate is often absent from affirmative action programs, since government officials are reluctant to confess the past sins of their agencies.

42. The Supreme Court had previously said that actions by government officials to racially balance elementary and secondary schools would be justified as measures designed "to prepare students to live in a pluralistic society." Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). But Bakke involved a more difficult question since, unlike public elementary and secondary schools that all children may attend, in colleges and professional schools there is competition for a limited number of places.

43. 438 U.S. at 408 (Stevens, J., concurring in part and dissenting in part).

44. 443 U.S. 193 (1979).

45. 443 U.S. at 200, 204.

46. Id. at 198 n. 1.

47. Id. at 203 (quoting from remarks of Senator Hubert Humphrey) the Court added: "It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long' constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy" (Id. at 204).

48. Id. at 208.

49. Id. at 208-209.

50. See Leadership Conference on Civil Rights, Without Justice: A Report on the Conduct of the Justice Department in Civil Rights in 1981-82 (February 1982), pp. 41-51.

51. The regulations of the Department of Education authorize affirmative action by universities, even in the absence of prior discrimination to "overcome the effects of conditions" that resulted in limited participation by minorities. 45 C.F.R. Part 80. Guidelines issued by EEOC encourage voluntary affirmative action and provide detailed guidance to employers that can result in an EEOC certification of the lawfulness of their plans, 29 C.F.R. 1608 (1979).

52. In the current recession, the jobless rate for blacks is 18.5 percent (compared with an overall rate of 9.8 percent) and half of all black teenagers are unemployed. The unemployment rate for Hispanic Americans is 13.9 percent. The New York Times, August 7, 1982, pp. 44.

53. The analysis of the 1980 Census is reported in The New York Times, July 20, 1982, p. A1, and July 27, 1982, p. D22. See, also, Malveaux,

"Shifts in the Employment and Occupational Status of Black Americans in a Period of Affirmative Action" in Working Papers: Bakke, Weber and Affirmative Action (Rockefeller Foundation, 1979), p. 137 ff.

54. The figures appear in Bureau of the Census, Current Population Reports, May 1982. The statistics for earlier years are reported in Malveaux, supra note 55 at pp. 148 ff. From 1960 to 1977, blacks as the percentage of total employees in each category increased from 4 percent to 8.4 percent of all professional and technical workers and from 3 percent to 4.8 percent of all managers. At the same time, blacks were moving out of some lower-status jobs, declining from 50 to 35 percent of all household workers.

55. Malveaux, supra note 55 at 30.

56. Id.

57. Wilson, Working Papers, at pp. 170-175.

58. Wilson, The Declining Significance of Race: Myth or Reality, Fifth Annual Symposium of University of Pennsylvania Afro-American Studies Program, March 29-30, 1979, p. 8.

59. The proportion of black education majors dropped from 45 percent to 26 percent in the same period.

60. Statistics are drawn from figures cited by the U.S. Commission on Civil Rights in Equal Opportunity: Affirmative Admissions Programs at Law and Medical Schools (June 1978), pp. 74-75, and from Department of Education's Higher Education General Information Survey. Since law school enrollment burgeoned during the 1970s, the numerical increase in minority students may be even more noteworthy. In 1969, there were only 2,933 minority students, including 2,128 blacks, enrolled in approved law schools. By 1979 there were 10,008 minority students, including 5,257 blacks.

61. Statistics are drawn from the Journal of Medical Education, v. 51 (August 1976), p. 692 and v. 55 (December 1980), p. 1042; and The New York Times, November 9, 1980, p. 67. During the last decade, the increase in enrollment of women in medical and law schools has been even more striking. In 1971, only one medical student in 10 was a woman. In 1980, one medical student in every four was a woman. These changes are less attributable to specific affirmative action programs than to the elimination of admissions barriers by professional schools and the revolution in perceptions of women's role in working society.

62. See Alexis, The Effect of Admission Procedures on Minority Enrollment in Graduate and Professional Schools, in Working Papers, supra note 55 at pp. 52 ff.

63. See Statement of Bernard Anderson, Hearings before Subcommittee on Employment Opportunities, House Committee on Education and Labor, 97th Cong., 1st session, v. 1, pp. 219-220.

64. See Statement of Phyllis Wallace, House Hearings, supra note 65 at pp. 528-529.

65. See The Washington Post, April 11, 1982, p. A10.

66. See Statement of Working Women at Congressional briefing (July 22, 1981).

67. The Washington Post, April 11, 1982, p. A10.

68. Id.

69. The distinction made under such programs is between groups that have been victims of official government policies requiring or sanctioning discrimination and those that have been subject only to private discrimination.

70. Some business people have voiced support for affirmative action, noting that "goals and timetables are a standard management technique for achieving business objectives." See, e.g., statements of Kaiser Aluminum Company executives, The Washington Post, April 13, 1982, pp. A1, 6.

71. Statement of Morris B. Abram, before U.S. Commission on Civil Rights, Consultations on the Affirmative Action Statement, p. 26. Among other critics whose views are summarized here are John Bunzel, Consultations, p. 30; Thomas Sowell, "Equal Opportunity or the Numbers Game" in the American Educator, Fall, 1978, p. 11; Nathan Glazer, Affirmative Discrimination (Basic Books, 1975).

72. Gilder, "The Myth of Racial and Sexual Discrimination," National Review (November 14, 1980), pp. 1381-90.

73. Abram, supra note 73 at 29.

74. deLeone, "Creating Incentives for Change," 41 Christianity and Crisis (March 1981), p. 92.

75. In American jurisprudence, the outcome of cases often is determined by how the burden of proof is allocated. One justice of the Supreme Court, William Rehnquist, has argued in school desegregation cases that the Court should do no more than to remedy the "incremental segregative impact"--the difference between the segregation that exists now and that which would exist if government had done no wrong. The burden would be on the minority person seeking the remedy. In the film It's A Wonderful Life, the protagonist, played by James Stewart, is on the verge of suicide

because he considers his life a failure when a "guardian angel" intervenes. The angel is able to recreate the distressed circumstances of the hero's town, friends and family as they would have been if the hero had never lived, and thus demonstrate to him that his life has not been a failure. The movie ends happily.

But lacking such divine intervention, there is no way in civil rights cases to meet Justice Rehnquist's test of recreating the situation that would exist if the wrong had never occurred. Instead, affirmative action policy seeks more pragmatically to ascertain the steps that will provide victims of discrimination opportunity in the future.

76. One critic, Allen Sindler of Berkeley, has suggested that the political power to perpetuate preferences may come through extension of them to other ethnic groups--"white ethnics from Southern and Eastern Europe" is the example he gives. But the likelihood of such political alliances seems extremely remote and preferences not based on a history of state-imposed discrimination would be subject to legal attack. One extension of affirmative action now being used in some professional schools gives special consideration to applicants who can show that they have overcome a background of economic and social disadvantage to advance as far as they have. This is hardly the official recognition of race or ethnicity that Professor Sindler fears and is arguably a positive contribution to enhancing opportunity.

77. President Lyndon B. Johnson, commencement address at Howard University (1965).